Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

MARY CHRISTINE O'CONNOR,

*Petitioner,*

– against –

CHURCH OF ST. IGNATIUS LOYOLA
and REV. WALTER MODRYS,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO
THE NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT

## PETITION FOR WRIT OF CERTIORARI

Robert M. Rosen, Esq.
*Counsel of Record*
Rosen, Leff
105 Cathedral Avenue
Hempstead, New York 11550
(516) 485-3500

## QUESTION PRESENTED

Should the ministerial exception to claims for employment discrimination protect a religious organization from liability for its employment decision where the decision was not rooted in religious belief or doctrine?

## PARTIES TO THE PROCEEDING

Petitioner is Mary Christine O'Connor.

Respondents are Church of Saint Ignatius Loyola and Reverend Walter Modrys.

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## BASIS FOR JURISDICTION

Petitioner seeks a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of New York, First Department in this case (779 N.Y.S.2d 31, 8 A.D.3d 125) (App-3). By Order dated October 19, 2004 (2004 N.Y. LEXIS 2452) (App-5), the New York State Court of Appeals denied Petitioner's motion for leave to appeal the decision of the Appellate Division. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Petitioner filed an action in the Supreme Court of the State of New York, New York County, to remedy discrimination on the basis of her sex and disability in the terms, conditions and privileges of her employment with Respondent, Church of Saint Ignatius Loyola, in violation of Chapter I, Title 8 of the Administrative Code of the City of New York § 8-101 et seq. On motion by the defendants, Church of Saint Ignatius Loyola and Reverend Walter Modrys, for summary judgment, the trial court found that "the First Amendment's prohibition against entanglement in church policy" rendered Petitioner's claims "not actionable."

## STATEMENT OF THE CASE

### A. *Petitioner's Claims*

Petitioner, Mary Christine O'Connor, began her employment with Church of St. Ignatius Loyola in 1987 as a Pastoral Associate and Chaplain. In January 1996, when Petitioner informed Respondents of her pregnancy and pregnancy related illness, Petitioner's supervisor, Reverend Walter Modrys, began to treat her in a hostile and discriminatory manner. Petitioner endured Reverend Modrys' discriminatory remarks and suffered disparate treatment, including undue criticism of her work, and a *de facto* demotion. Despite her complaints

to Church officials, Reverend Modrys' treatment continued and, in November 2000, Petitioner was forced to leave her employment with the Church.

To redress the deprivation of her civil rights, Petitioner filed a lawsuit under the Administrative Code of the City of New York for sex and disability discrimination and constructive discharge.

B. *Facts Presented Below*

In the New York County Supreme Court, Petitioner's memorandum of law in opposition to the defendants' motion for summary judgment pointed to the secular and administrative nature of Petitioner's job by citing the record established during discovery:

> From the beginning of her employment in September 1987, Mrs. O'Connor's primary duties for the Church of St. Ignatius Loyola included coordinating the music for the 7:30 evening mass — a real prime responsibility for her. Mrs. O'Connor organized events and did work at home such as phone calls, preparation for retreats, office work. Even in connection with her seemingly religious title of "chaplain," Mrs. O'Connor would work with the teachers, music personnel and the students to organize masses, prayer services, retreats, sacraments, and any other prayer event; she would also be a resource for the parents in assisting the families in the above celebrations. With respect to mass, as well, much of her job was administrative.

These job duties and responsibilities remained the same for Petitioner, a lay employee, until January 1999 when she returned from maternity leave after the birth of her second child. After she returned, as a further act of discrimination, Reverend Modrys stripped Petitioner of her office, and most of her duties as Associate Pastor and Chaplain.

In support of their motion for summary judgment, Respondents argued that Petitioner's claims are barred for lack of subject matter jurisdiction. In their initial brief, Respondents cited deposition testimony that described Petitioner's role as Associate Pastor and Chaplain. Respondents' argument rested on disputed facts that described Petitioner's duties as spiritual and pastoral in nature. According to Respondents, those facts alone required the application of the ministerial exception to the claims in this action. However, even assuming, *arguendo*, that Petitioner's job duties were spiritual and pastoral in nature, the record below establishes that the harassment that Petitioner suffered was not related to (nor does it require this Court to evaluate) religious doctrine or policy.

Beginning in January 1996, after she informed church officials of her pregnancy, Petitioner was subjected to harassment and discrimination on the basis of her sex and pregnancy. Specifically, Petitioner endured Reverend Walter Modrys' discriminatory remarks and treatment. Petitioner's memorandum of law in opposition to the defendants' motion for summary judgment cited to the record established during discovery wherein, in June 1996, a member of the Church's congregation called Petitioner a "barren bitch." The record shows that Petitioner informed Reverend Modrys of the incident, and he replied, in the presence of others, that the parishioner "was only half right." Reverend Modrys then repeated the comment to the Church's music director in Petitioner's presence.

As further evidence of discriminatory treatment, the record shows that when Petitioner received only a $100.00 Christmas gift from the Church, as compared to the $200.00 she had received as a Christmas gift prior to her pregnancy, Reverend Modrys told her that the Church "had done enough for [her]" — referring to the alleged costs the Church had incurred because of Petitioner's pregnancy.

Petitioner complained to Church officials about the discrimination she suffered, but her complaints were ignored. After Petitioner returned from maternity leave (after the birth of her second child) in January 1999, Reverend Modrys told her that he "[did] not think that [she] could do [her] job with two children" and subsequently stripped her of her office and most of her duties.

C. *The New York Supreme Court's Decision*

The trial court accepted Respondents' argument, and decided a disputed and material issue of fact against Petitioner — robbing her of her right to a jury trial. By Order and Judgment dated July 31, 2003 (App-1), the New York County Supreme Court granted summary judgment in favor of Respondents and dismissed Petitioner's claims. The decision merely stated that "the Human Rights Law shall not be construed to bar any religious institution from limiting employment to promote the religious principles for which it is established." (App-2)

D. *The Appellate Division's Summary Order*

Similarly, the Appellate Division's order affirming the trial court's decision did not even proffer a rule of law on which the Court based its decision, and merely cited case law from three different circuits. The Court determined that because Petitioner was a "pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church . . . [the Court's] [i]nterference . . . would violate the Free Exercise Clause of the First Amendment." (App-3)

## REASONS FOR GRANTING THE WRIT

A. *Introduction*

Supreme Court Rule 10(b) states that it is within this Court's discretion to grant a writ of certiorari where a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals.

In affirming the trial court's decision on summary judgment in favor of Respondents, the New York State Appellate Division held that evaluation of Petitioner's claims of harassment and discrimination in the terms, conditions and privileges of her employment on the basis of her sex and pregnancy would "violate the Free Exercise Clause of the First Amendment, under the 'ministerial exception' to employment discrimination claims." (App-3) However, recent decisions from the Ninth Circuit Court of Appeals — on point with the facts of this case —- are directly contrary to the holding of the Appellate Division herein.

In *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), and *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), the Ninth Circuit found that the ministerial exception *does not* foreclose a plaintiff's sexual harassment claim where the questions posed by the suit do not require interpretations of religious doctrine or scrutiny of the defendant's ministerial choices. *Elvig*, 375 F.3d at 964 (emphasis added).

B. *The application of Title VII to the case at bar does not violate the Free Exercise Clause*

Where First Amendment values are plainly jeopardized by Title VII's reach into the employment decisions of a church regarding its ministers, the ministerial exception applies to reconcile the statute with the Constitution. *Bollard*, 196 F.3d at 946. However, the scope of the ministerial exception is

limited to what is necessary to comply with the First Amendment. *Id.* Claims brought by lay employees of a religious institution, where the religious interests of the church are not to be evaluated, are constitutionally permissible and, therefore, not barred by the ministerial exception to Title VII. *See id.*

While the First Amendment protects a church's employment decisions regarding its ministers, the decision to sexually harass is not a protected personnel decision. *See Bollard,* 196 F.3d at 946-47. Like *Bollard*, this is not a case where the Church's choice of representative is questioned. Here, Petitioner has not questioned the Church's decision to terminate her, as it was not her discharge, but her decision to leave that supports her claim. *See id*, 196 F.3d at 947 (constructive discharge in the context of a sexual harassment claim serves to demonstrate the severity of the harassment suffered). Accordingly, the ministerial exception will not apply to insulate the Church from vicarious liability for the acts of harassment alleged by Petitioner herein.

As established by the Ninth Circuit in *Bollard* and *Elvig*, whether a plaintiff can carry her burden of proving that she was sexually harassed, and whether the defendants can prove their affirmative defense, is a restricted and secular inquiry. *See Elvig*, 375 F.3d at 963.

Where, as is the case here, the Church has pled no religious justification for the harassment Petitioner alleges, nor offered any doctrinal reason for "tolerating or failing to stop" it, the ministerial exception does provide a cloak to shield the Church from liability for clear instances of sexual harassment. *See Elvig*, 375 F.3d at 962-63. Reverend Modrys' decision to harass Petitioner and the Church's decision not to intervene or stop the reported conduct, are insufficient to trigger the protection of the ministerial exception. *See id.*

C. *Enforcement of Title VII in the instant case will not violate the Entanglement Clause*

Another basis for applying the ministerial exception to claims brought against religious institutions under Title VII is if the statute violates the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I. There is a "three-part test to determine whether Title VII violates the Establishment Clause: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Bollard*, 196 F.3d at 948, *citing Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971) (internal quotation marks omitted). Since the court has "already held that Title VII has an obvious secular and legislative purpose, and its principal effect neither advances or inhibits religion, the only remaining question is whether applying Title VII in this case would foster an impermissible government entanglement with religion."

Applying Title VII to the clergy-church employment relationship, where the church's freedom to choose its ministers is at stake, constitutes an impermissible government entanglement with religion. *See Bollard*, 196 F.3d at 948-49. However, as stated above, Respondents have not offered a religious justification for the discrimination and harassment Petitioner suffered, and Petitioner's claims do not implicate the Church's choice of representative. *See Elvig,* 375 F.3d at 956. Therefore, Petitioner's suit does not "impermissibly promote substantive entanglement between church and state." *Elvig,* 375 F.3d at 957, *citing Bollard,* 196 F.3d at 949.

Further, although entanglement may also result in the case of a "protracted legal process" between church and state, Title VII cases create only an "acute" procedural entanglement issue. *See Bollard*, 196 F.3d at 949. The "restricted inquiry" into, (1) whether or not Petitioner suffered harassment, (2) the severity of the conduct, and (3) the measures taken to correct it, does not constitute an "intrusion into sensitive religious matters" and the application of Title VII to the facts of this case does not violate the Establishment Clause. *See Bollard*, 196 F.3d at 950.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROSEN, LEFF
By: DAVID M. FISH, ESQ.
*Attorneys for Petitioner*
105 Cathedral Avenue
Hempstead, New York 11550
(516) 485-3500

# APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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MARY CHRISTINE O'CONNOR,

Plaintiff,

-against-

Index No.
0119024/01

CHURCH OF ST. IGNATIUS LOYOLA
and REV. WALTER MOODRYS,

Defendants.

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**DeGrasse, J.:**

Defendants move for summary judgment. This action has been brought to recover damages for discrimination in employment on the basis of gender and disability in violation of the New York City Human Rights Law (Administrative Code of the City of New York § 8-107). Plaintiff's employment by defendant Church of St. Ignatius Loyola began in 1987. It is alleged in the complaint that in 1996 the Church's Pastor, defendant Rev. Walter Moodrys, treated her in a discriminatory manner by reason of her pregnancy. The complained of treatment consisted of remarks and a reduction of plaintiff's annual Christmas gift from $200 to $100. In February 1998, plaintiff became pregnant again and contracted hypermesis, an illness related to the pregnancy. It is alleged in the complaint that during her illness and absence from work plaintiff was not visited or sent flowers as other church employees had been during their non-pregnancy related illnesses.

Plaintiff alleges that upon her return to work on May 19, 1998, Rev. Moodrys complained about the quality of her work and the amount of money she cost the Church while out on disability. In October 1998, Moodrys allegedly told

plaintiff that he did not think she could do her job because she had two children. In the spring 2000, plaintiff was demoted and stripped of most of her duties including her responsibilities as Chaplain. The said duties included developing monthly liturgies and serving as Cantor during services. Plaintiff claims to have been forced to leave the Church's employ in November 2000 based upon the aforementioned treatment. Plaintiff filed a complaint with the New York State Division of Human Rights (SDHR) on May 10, 2001.

Administrative Code § 8-502(d) requires that actions brought under the Human Rights Law be commenced within three years after the alleged unlawful discriminatory practice or act of discrimination has occurred. The said statute of limitations is tolled upon the filing and during the pendency of a complaint with SDHR. This action was commenced on October 12, 2001. Therefore, plaintiff's claims which accrued before May 10, 1998 are time-barred. The continuing violation exception does not apply because the conduct complained of consisted of discrete acts (*see Elenmayer v ABF Freight Sys.*, 318 F3d 130). Administrative Code § 8-107(12) provides that the Human Rights Law shall not be construed to bar any religious institution from limiting employment to promote their religious principles for which it is established. The statute embodies of the First Amendment's prohibition against entanglement in church policy (*see e.g. Alicea-Hernandez v the Catholic Bishop of Chicago*, 320F3d 698). Accordingly, plaintiff's claims based upon her demotion and discharge are not actionable. In all other respects, plaintiff's allegations are insufficient to establish a prima facie case of discrimination. Accordingly, defendants' motion for summary judgment is granted. The Clerk shall enter judgment dismissing the complaint.

Dated: July 16, 2003

/s/

J.S.C.

Buckley, P.J., Nardelli, Andrias, Williams, Gonzalez, JJ.

3925 Mary Christine O'Connor,

Plaintiff-Appellant,

-against-

Church of St. Ignatius Loyola, et al.,

Defendants-Respondents.

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Rosen, Leff, Esqs., Hempstead (David M. Fish of counsel), for appellant.

Jackson Lewis LLP, White Plains (Daniel V. Duff III of counsel), for respondents.

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Order, Supreme Court, New York County (Leland DeGrasse, J.), entered July 31, 2003, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly determined that it lacked subject matter jurisdiction over these causes of action. Plaintiff was a pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church. Interference with this mission would violate the Free Exercise Clause of the First Amendment, under the "ministerial exception" to employment discrimination claims (*Equal Empl. Opportunity Comm. v Catholic Univ. of Am.*, 83 F3d 455 [DC Cir]; *Rayburn v General Conference of Seventh-Day Adventists*, 772 F2d 1164 [4th Cir], *cert denied* 478 US 1020; *Kraft v Grace Church*, 2004 US Dist LEXIS 4234 [SDNY]). Accordingly, we need not reach plaintiff's remaining contentions.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 17, 2004

/s/ Catherine O'Hagan Wolfe
CLERK

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October 2004

**PRESENT**, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

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1-10 Mo. No. 752

Mary Christine O'Connor,

Appellant,

v.

Church of St. Ignatius Loyola, et al.,

Respondents.

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A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court